

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2009

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

TERRY WAYNE JENKINS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE

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Western District of New York,
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IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2009

UNITED STATES OF AMERICA, *Appellee,*

vs.

TERRY WAYNE JENKINS, *Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

CR 74-105

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant, Terry Wayne Jenkins, was convicted on June 19, 1974 after a jury trial, on both counts of a two-count Indictment that charged him with forcibly breaking into a United States Post Office with the intent to commit larceny

therein, in violation of Section 2115 of Title 18, United States Code,¹ and with the theft of United States Post Office property valued at over \$100.00; in violation of Section 1707 of Title 18, United States Code.²

On July 15, 1974, Terry Wayne Jenkins was sentenced to a term of three years on each of the two counts, the sentences were to run concurrently. This appeal is from the judgment of conviction.

Statement of Facts

Sometime late in the evening of February 24, 1973 or early in the morning on February 23, 1973, the United States Post Office in North Tonawanda, New York was forcibly entered by breaking a window in the rear of the building (Tr. 18, 36).

The broken window was discovered by parttime employee, Eugene Moderacki, on Sunday, the 25th of February, 1973 when he came to work at the Post Office (Tr. 18). Moderacki did not realize that a breakin had, in fact, occurred, and simply cleaned up the broken glass and covered the open window (Tr. 18).

The burglary was discovered by Superintendent Edward Durkee the following Monday morning on the 26th day of February, 1973 when he reported for work (Tr. 28). He found that several fixed credit drawers, where postal

¹ Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building or part thereof, so used, any larceny or other depredation, shall be fined not more than \$1,000.00 or imprisoned not more than five years, or both.

² Whoever steals, purloins, or embezzles any property used by the Postal Service, or appropriates any such property to his own or any other than its proper use, or conveys away any such property to the hindrance or detriment of the public service, shall be fined not more than \$1,000.00 or imprisoned not more than three years, or both. As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j) (18), 84 Stat. 778.

stamps and supplies are kept, were open and that the area around the drawers was in a general disarray (Tr. 28).

Detective James Rizzo of the North Tonawanda Police Department came to the Post Office and conducted an investigation that indicated that a burglary had occurred, with the point of entry being a rear window of the Post Office (Tr. 37). He further determined that certain fixed credit drawers had been pried open (Tr. 37).

Postal Inspector Peter Pomponio then arrived on the scene and conducted an audit of the various fixed credit drawers that revealed that approximately \$1,995.00 in postal property was missing (Tr. 49).

Mary Diaz lived in an apartment house located directly across the street from the Post Office in North Tonawanda (App. 22a). (All references will be to Appellee's appendix.) In the first week of February, 1973, she was visited by a former boyfriend of hers, Terry Wayne Jenkins (App. 22a). Jenkins lived at her apartment during his stay in North Tonawanda (App. 22a).

On February 25, 1973 at approximately 10:00 P.M., Jenkins told Mary Diaz that he was going to "rip-off the Post Office." (App. 23a). He then took a screwdriver from the kitchen drawer and left the apartment (App. 24a). Mary Diaz watched him leave the apartment house, cross the street and walk down an alley next to the Post Office (App. 36a, 37a).

At approximately 11:15 P.M., Jenkins returned to Mary Diaz' apartment lugging several large, brownish bags. Jenkins also had with him the screwdriver that he had taken from the kitchen drawer, only now it was bent (App. 25a).

The contents of the bags were emptied on Mary Diaz' floor, revealing quantities of stamps, envelopes, and other postal supplies (App. 26a).

Jenkins then told Mary Diaz never to say a word to anyone or he would "involve" her or "fix her." (App. 27a).

During the first week of March, 1973, Jenkins left the area, taking the postal property with him (App. 29a).

Questions Presented

1. Did the District Court err in denying the defendant the names of government witnesses prior to trial?
2. Did the District Court err in limiting the scope of cross examination of a government witness?

ARGUMENT

POINT I

The District Court did not err in denying the defendant's discovery request for the names of government witnesses.

Soon after the defendant was arraigned, informal discovery, as encouraged by the presiding U.S. Magistrate, began between defense and the government. Defendant sought the names of the government witnesses and the government declined to produce them (App. 1a-4a).

This request was renewed by defendant in an oral motion in front of the Magistrate on May 7, 1974, at which time the request was denied (App. 5a-10a).

The Magistrate referred the matter to District Court Judge John T. Curtin (App. 11a). Defendant then served

formal motion papers on the Government again requesting the names of government witnesses (App. 12a, 13a). The government, by its response, again declined to produce the information sought (App. 16a-19a). In a meeting in the Judge's chambers on June 3, 1973, Judge Curtin declined to order the government to produce the names of its witnesses and the case was set for trial.

The defendant argues that the Court erred in refusing to order the government to give defendant the names of its witnesses.

Application for discovery under Rule 16(b)³ of Federal Rules of Criminal Procedures as liberally interpreted since the 1966 amendment, is a matter within the sound discretion of the trial judge, and will not be disturbed on appeal unless there is a clear abuse of discretion. *United States v. Baggett*, 455 F.2d 476, 477 (5th Cir. 1973); *United States v. Anderson*, 481 F.2d 685, 693 (4th Cir. 1973).

The denial of defendant's request for the names of government witnesses, in non-capital cases,⁴ is not an abuse of

³ "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

⁴ A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.

the District Court's discretion in interpreting 16(b). *United States v. Baggett, supra*; *United States v. Anderson, supra*; *United States v. Wolfson*, 413 F.2d 804, 808 (2d Cir. 1969).⁵

Since the defendant had two opportunities to present his argument for seeking the names of witnesses, he cannot say the court abused its discretion in denying him this relief.

The trial court may, in its discretion order the government to produce a list of witnesses under Rule 16(b). *United States v. Jordan*, 466 F.2d 99, 101 (4th Cir. 1972).⁶ The proposed amendment to Rule 16 of the Federal Rules of Criminal Procedure, will call for the Government to produce a list of witnesses.⁷ At the present time, however, the

⁵ The following cases from other circuits also hold that denial of names of government witness is not an abuse of discretion. *United States v. Addonizio*, 451 F.2d 49, 64 (3rd Cir. 1972); *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970); *United States v. Cansler*, 419 F.2d 952, 954 n.1 (7th Cir. 1969); *United States v. Harflinger*, 436 F.2d 989, 936 (8th Cir. 1970); *United States v. Glass*, 471 F.2d 832, 833 (9th Cir. 1969) and *Nipp v. U.S.*, 422 F.2d 509, 512 (10th Cir. 1970).

⁶ The following comment by Harris Steinberg at the Judicial Conference of the Second Circuit in 1967, 44 F.R.D. 481, 511, highlight the central discovery problem. "And in the process you build up a body of case law which isn't really useful, because a judge in Louisiana is going to feel differently than a judge in New Jersey. Two judges in the same district, who have had different lunches, will probably feel differently that day, and it ends up with a hodge-podge of case law, in which you can literally find a case on either side of any point in criminal discovery."

⁷ Proposed amendment to Federal Rules of Criminal Procedure 16(a) (1) (E). Upon request of the defendant the government shall furnish to the defendant a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government. When a request for discovery of the names and addresses of witnesses has been made by a defendant, the government shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

interpretation of Rule 16 falls to the discretion of the trial judge, and his denial in this case did not involve an abuse of discretion.

POINT II

The District Court properly exercised its discretion in limiting the scope of cross examination of the government witness.

During the cross examination of Mary Diaz, a government witness, defense counsel began to ask questions with respect to the witness's prior marital status (App. 30a). The trial court interrupted this line of questioning, and a side bar conference ensued between counsel and the trial judge (App. 31a).

The trial judge ruled that the line of questioning concerning the witness's prior marriages was not proper impeaching material, and restricted cross examination with regard to this area:

Mr. Lalime: If I can go one step further so it is on the record. The witness comes in here to testify against my client, and I have to determine what her motives are. One of the basic motives was when they were in Florida, the argument they had down there, she was receiving welfare checks down there through fraud and against the law and she says "It is none of your goddamn business."

The Court: If you can show motive to have bias against this man, I would permit it, but it does not make any difference if this woman was married before a clerk or a clergyman or what. If you wanted this information and you thought it was important, we could have had it beforehand.

Mr. Lalime: I couldn't. I asked for the witness and—

The Court: Let us get to the information you want and let us not ask questions to embarrass her (App. 33a).

The defendant now argues that the trial judge erred in restricting his cross examination on the alleged prior misconduct of the witness.

The general rule in this Circuit has been that the trial judge has broad discretion in setting the limits of cross examination. *United States v. DeMarco*, 488 F.2d 828, 831 n. 8 (2nd Cir. 1973), citing *United States v. Kahn*, 472 F.2d 272, 281 (2nd Cir. 1973), *cert. denied*, 411 U.S. 982; *Alford v. United States*, 282 U.S. 687, 694 (1931):

The trial judge must balance the dangers of admitting evidence of prior acts of misconduct not resulting in conviction with its legitimate impeachment value. *United States v. Dorfman*, 470 F.2d 246, 248 (2nd Cir. 1973). Also see *United States v. Kahn*, *supra*, at 279-281; *United States v. Bowe*, 360 F.2d 1, 15-16 (2nd Cir.), *cert. denied*, 385 U.S. 961, and McCormick, C., *Law of Evidence*, Section 42 at Page 87.

The Court decided that inquiries on cross examination into the witness's prior marriages would subject her to embarrassment and humiliation for actions not directly relevant to her veracity (App. 33a). This is precisely the exercise of discretion that a trial judge should make when confronted with these factors. *Alford v. United States*, *supra*, at 694; *Lyda v. United States*, 321 F.2d 788, 793 (9th Cir. 1963).

The court did, however, contrary to petitioner's assertion at page 8 of his brief, allow defense counsel to cross examine the witness as to the alleged welfare fraud:

Q. Are you receiving public assistance for the two children now or the three children?

A. Yes, sir.

Q. Are you receiving it under the name of Pacheco?

A. No, sir.

- Q. You are receiving it under the name of Diaz?
 A. Yes, sir.
 Q. Now, in the State of Florida, weren't you receiving two checks?
 A. No, sir.
 Q. One for Pacheco?
 A. No.
 Q. And one for Diaz?
 A. No, sir.
 Q. You are absolutely sure of this, is that right?
 A. Yes. (App. 35a)
 Q. Did Terry ever, going back to the Florida arrangement for just a little while, when you were down there with Terry, did he ever tell you it is against the law to receive two checks under two different names for the Welfare?
 A. No, because I wasn't getting two checks.
 Q. He never told you that though?
 A. No. (App. 40a)

Since the defendant was allowed on cross examination to inquire into the alleged prior misconduct of the witness not resulting in conviction, he cannot now argue that the trial judge abused his discretion in limiting the scope of cross examination.

If this type of cross examination is allowed to impeach credibility, such inquiry is limited to cross examination itself; if the witness denies the misconduct, the questioner must accept the answer. *United States v. Sager*, 49 F.2d 725, 730 (2nd Cir. 1931); *United States v. Davenport*, 449 F.2d 696, 700 n.2 (5th Cir. 1971), McCormick, C., *Law of Evidence*, Section 42, at page 89. Thus, defendant's inability to pursue this inquiry, once begun, was not of the trial judge's decision but a function of the laws of evidence. *Id.*

Therefore, there was no abuse of discretion by the trial judge in restricting the scope of cross examination.

Conclusion

It is respectfully submitted that for the foregoing reasons the judgment of conviction should be affirmed.

Respectfully submitted,

JOHN T. ELFVIN,
United States Attorney,
Western District of New York,
Attorney for Appellee,
502 U.S. Court House,
Buffalo, New York 14202.

JAMES A. FRONK,
Assistant United States Attorney,
Of Counsel.

APPENDIX

Letter of April 30, 1974 Requesting Discovery

THIELMAN & LALIME
ATTORNEYS AND COUNSELORS AT LAW
Suite 1710
Liberty Bank Building
Buffalo, New York 14202

(716) 853-4123

April 30, 1974

James Fronk
Assistant U. S. Attorney
U. S. Courthouse
68 Court Street
Buffalo, New York 14202

Re: Terry Wain Jenkins—#74-105 CR.

Dear Mr. Fronk:

Pursuant to our meeting with U. S. Magistrate Edmund F. Maxwell concerning pre-trial discovery on the captioned case, I am requesting in letter form at this time the following items which I deem necessary to prepare for a swift and equitable trial for the Defendant:

1. All Brady Material;
2. All scientific reports resulting from tests conducted by the U. S. Postal Authority, especially those dealing with fingerprints found at the scene of the alleged burglary, whether belonging to the Defendant or to other parties;
3. Names of any and all witnesses who testified before the Grand Jury which led to the Indictment of the captioned matter;

Letter of April 30, 1974 Requesting Discovery.

4. Any and all statements, whether exculpatory or incriminating, that the U. S. Postal Authority, or any agency of the Government might have of the Defendant given by him before or after custodial detention;
5. Copies of the Defendant's criminal record which the Government has in its possession.

Thanking you in advance for your anticipated cooperation in this matter, I remain

Very truly yours,

THIELMAN & LALIME

JAMES L. LALIME

James L. Lalime

JLL/mcm

#1844

CC.: U. S. Magistrate Edmund F. Maxwell

Government's Letter of Response of May 8, 1974

JAMES A. FRONK
JAF:bp
CR 74-105

May 8, 1974

James L. Lalime, Esq.
Suite 1710
Liberty Bank Building
Buffalo, New York 14202

Re: United States of America vs.
Terry Wayne Jenkins

Dear Mr. Lalime:

The following will comprise the government's answer to your pre-trial discovery request sent to us by letter on April 30, 1974.

The government represents that it has no Brady material at the present time, but is ever mindful of its continuing obligation to produce such material and should such material become known, it will immediately forward it to you.

There were scientific tests conducted on various instruments and articles by the United States Postal Service, but those tests have not yet come back from the postal lab. On May 6, 1974, I again inquired as to the results of these tests as to when they would be forthcoming and it was indicated to me that by the end of this week they should be in.

The government at this time declines to turn over the names of any witnesses who testified before the Grand Jury.

Government's Letter of Response of May 8, 1974.

Other than the general synopsis explained in the following paragraph, the Government knows of no other statements made by defendant to Government agents relating to this offense.

Certain oral statements were given by defendant Jenkins to agents of the United States government and a synopsis of these statements is enclosed with this letter.

Also enclosed with this letter is a recent copy of defendant's criminal record.

If you have any further discovery requests, do not hesitate to contact me. I believe Magistrate Maxwell indicated in court the other day that it would be best to proceed by motion if any further discovery was desired.

To reiterate, I have not yet received the scientific test results which we spoke about in court yesterday, but will forward them to you as soon as I receive the same.

Very truly yours,

JOHN T. ELFVIN
United States Attorney

By: JAMES A. FRONK
Assistant United States Attorney

ENC.

cc: M. Maxwell

Government's Letter of Response of May 8, 1974.

A SYNOPSIS OF CONVERSATIONS HAD BETWEEN
TERRY WAYNE JENKINS AND POSTAL INSPEC-
TORS JOSEPH PARKINSON AND STEVE
BOTTITA ON MARCH 20, 1974

Defendant was arrested on the 20th of March, 1974 in Fort Lauderdale, Florida area. At the time of arrest, he was advised of his rights by the inspectors and he signed a copy of these warnings and indicated that he waived them as they applied to him. A copy of this warning and waiver signed by the defendant is enclosed.

Q. Have you ever been in New York State? A. Yes.

Q. In Buffalo? A. Yes.

Q. In North Tonawanda? A. Yes.

Q. Where did you stay? A. Across the street.

Q. With whom? A. I've been in Dallas, Texas and other places, but I've never ripped off a post office.

Q. Who do you know in North Tonawanda? A. I'm not saying anything further.

At some time during this conversation, the defendant indicated to the inspectors that he had been sniffing transmission fluid earlier in the day and that that gave him a good high. This is a general synopsis of the remarks made by the defendant to the Postal Inspectors on the day in question.

Transcript of Magistrate's Decision on Discovery

Buffalo, N. Y.

May 7, 1974.

Magistrate Maxwell

Terry Wayne Jenkins.

CR-74-105

Appearances:

James Fronk, Esq., Ass't United States Attorney, Appearing on behalf of the Government.

James L. Lalime, Esq., Appearing on behalf of the Defendant.

The Court: Mr. Lalime, do you have anything else?

Mr. Fronk: Your Honor, Mr. Lalime has requested, by letter received by us last week, for some discovery material. I have just discussed it with him and I will comply with the request and I will so advise him by letter.

The Court: How about the fifth one?

Mr. Fronk: We decline that.

The Court: What is that, the names of the Government witnesses?

Mr. Fronk: Yes.

The Court: Are you asking for an adjournment until July 2nd so that you can require it under the new rules if they're passed?

Mr. Lalime: If my client wasn't in jail, your honor, of course I'd do that.

The Court: I know you wouldn't under any circumstances—

Mr. Lalime: The circumstances are in fact, that if there are no scientific reports or results from fingerprint examinations putting my client in the United States Post Office

Transcript of Magistrate's Decision on Discovery.

in North Tonawanda, and the statements given by witnesses before the Grand Jury would add a problem of co-conspirators or co-defendants then I would make the motion to dismiss the indictment for want of proof.

The Court: Well, if you're going to make motions to dismiss of course, those motions would have to be brought before Judge Curtin.

Mr. Lalime: Yes, your honor.

Mr. Fronk: If I might add, as Mr. Lalime easily knew, co-conspirators listed—it would be a question of fact.

The Court: Well, are there scientific reports?

Mr. Fronk: There are but I haven't gotten them yet. I have instructed Mr. Lalime.

The Court: Do you have any idea when you're going to get them?

Mr. Fronk: I'm told two already are in as of yesterday and the others I just haven't received. I asked them to rush them that's all I can say.

Mr. Lalime: This is the question I would have on the insufficiency of the indictment, your honor. If there has been no scientific proof presented to the Grand Jury, just the statements of the witnesses, this is why I need those witnesses. They're most important to my case.

The Court: Well, I—

Mr. Fronk: Again, since this is an indictment, isn't it a question for motion or discovery? It's a trial question.

The Court: Do you want to argue that motion for production of the names of Grand Jury witnesses at this particular time, do you want to do it orally?

Mr. Lalime: At this time in case law, your honor, it prohibits me from doing so.

The Court: It doesn't prohibit you from making the motions.

Transcript of Magistrate's Decision on Discovery.

Mr. Fronk: It prohibits him from making the motion, too, your honor, if it's not directed to discovery but directed to the sufficiency of the indictment.

The Court: Well, I'm just asking—I'm just talking about the question of discovery and the question of production of the names of the witnesses.

Mr. Lalime: Yes, your honor, I would like to go on record as making a motion orally for the production of the witnesses that the Government has presented before the Grand Jury.

The Court: Do you want to make any further argument relative to it?

Mr. Lalime: No further argument, your honor.

The Court: Mr. Fronk, do you want to say anything?

Mr. Fronk: Well, we respectfully decline.

The Court: Unless you're so directed by the court.

Mr. Fronk: Well, then we'd probably appeal.

The Court: You don't have a right to appeal on discovery proceedings.

Mr. Fronk: Exactly.

The Court: Your motion is denied, Mr. Lalime. I don't feel that you have the legal basis at this particular time. I will be interested to see if this new rule of criminal procedure does in fact go into effect on July 1st, requiring production of witnesses. I'm hopeful that at that particular time Mr. Fronk might be willing to go along with it.

Mr. Fronk: You can't tell, your honor.

Mr. Lalime: As soon as we do get the scientific results, your honor, we will—

The Court: Is it your intention, after you've looked at these reports which you get, to make a motion on that?

Mr. Lalime: I will make a motion at that time, your honor.

Transcript of Magistrate's Decision on Discovery.

The Court: Well, that motion of course would have to be directed to the Court and I'm just wondering if we should set a date for that motion right now because of the fact that this defendant is in custody.

Mr. Fronk: Well, the Judge mentioned yesterday at calendar that he means to speak to you about a way of transmitting those motions upstairs in a hurry.

The Court: Well, I know and I did talk to him about it and it would be my feeling at this particular moment to set this for motions on—I'd like to set it for the 13th very frankly. That would—but you would have only two days in which to make your motions.

Mr. Fronk: Well, if I respond to _____ on Mr. Lalime's letter today and he receives it tomorrow _____ to prepare—

The Court: Well, his letter is disposed of as far as I'm concerned. You have indicated that you're going to give him everything except the list of witnesses and that motion has been determined. The only problem we've got is if you don't get these reports within the next couple of days—

Mr. Fronk: Hopefully I can clarify that by this afternoon. I have a call waiting—

The Court: Alright. I'm going to send up a notice that this is on the calendar for May 13th for any motions respecting the merits of the indictment.

Mr. Lalime: Thank you, your honor.

The Court: And/or for trial if those motions are resolved at that particular time. Now what I'm asking you to do, Mr. Lalime, of course if you don't get this information upon which you can base your motion, please appear on May 13th, explain the situation to Judge Curtin, explain

Transcript of Magistrate's Decision on Discovery.

why we have set such an early date and if you feel you have to have an adjournment for the best interest of representing your client, of course I'm assuming you're going to ask for it.

Mr. Lalime: Fine, your honor. Thank you very much.

I, MARY C. LAFFEY, Clerical Assistant to Edmund F. Maxwell, United States Magistrate for the Western District of New York, do hereby certify that the foregoing transcript made by me is a full, true and correct record of the proceedings in the matter of United States of America v. Terry Wayne Jenkins, CR-1974-105, held before the said United States Magistrate on May 7, 1974.

IN WITNESS WHEREOF I have hereunto subscribed my name this 15th day of October 1974

MARY C. LAFFEY

Memorandum from Magistrate to Judge Curtin

UNITED STATES GOVERNMENT

MEMORANDUM

Date: May 7, 1974

To : Hon. John T. Curtin
From : United States Magistrate
Subject: U. S. v. Terry Wayne Jenkins
Cr-74-105

Assistant U. S. Attorney James Fronk
Defense attorney—James Lalime

This defendant is in jail in default of \$10,000 bail. He was arraigned on April 25, 1974. On May 7th, Mr. Lalime advised that he had received all discovery requested except scientific reports and names of witnesses. The Government advised that scientific reports were being prepared and would be furnished to defense counsel when received. The Government declined to give defendant the names of witnesses and defendant's motion to compel the Government to give the names of witnesses was denied.

In view of the fact that the defendant is in custody, the attorneys were advised that the case will be on Judge Curtin's calendar on May 13, 1974 for any motions relative to suppression or dismissal. I would suggest that Bob White send to the attorneys notices for May 13th.

E. F. MAXWELL
EDMUND F. MAXWELL

Defendant's Motion for Discovery

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

TERRY WAYNE JENKINS.

CR-74-105.

NOTICE OF MOTION.

Sir:

PLEASE TAKE NOTICE, that upon the annexed duly verified Affidavit of James L. Lalime, and on all the proceedings heretofore had herein, the undersigned will move this Court at the United States Courthouse, on or before the 4th day of June, 1974, for an Order directing the Government:

1. To disclose any and all statements made by witnesses concerning the guilt or innocence of the Defendant, Terry Wayne Jenkins.
2. Itemize and indicate with particulars wherein the Government has recovered any and all evidence of every kind from the private premises of any of the aforesaid witnesses.

That if the Honorable Magistrate feels that disclosure of the Grand Jury content should not be made to this

Defendant's Motion for Discovery.

Defendant's attorney, that an *in-camera* inspection be made of them to determine the sufficiency for Indictment.

And that all such information be delivered to him sufficiently in advance of trial so that he may appraise the same, so that he may know in what regard to exercise his constitutional right to compulsory process to secure the attendance of witnesses, so that he may exercise his constitutional right to the effective assistance of counsel by having his attorney in a position to know what witnesses to summon and what evidence to subpoena, and for such other and further relief as to the Court may seem just and proper.

Dated: Buffalo, New York, May 24, 1974.

Yours, etc.,

THIELMAN & LALIME,
JAMES L. LALIME, Esq., *Of Counsel*,
Attorneys for Defendant,
1710 Liberty Bank Building,
Buffalo, New York 14202.

To:

John T. Elfvin,
United States Attorney,
Att.: James Fronk,
502 U. S. Courthouse,
Buffalo, New York 14202.

Affidavit of James L. Lalime

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

TERRY WAYNE JENKINS.

CR-74-105.

State of New York, }
County of Erie, } ss.:
City of Buffalo. }

JAMES L. LALIME, being duly sworn, deposes and says:

1. That deponent is the attorney for the above-named Defendant and makes this Affidavit in support of the motion herein.

2. That, upon information and belief, from investigation of said case, it appears that the oral motion of discovery made for Brady and other data to be used against the Defendant in this Magistrate's Court has produced absolutely nothing which could be used either by the Government or by the defense in this case.

3. There is no scientific evidence, fingerprints, tool testings or otherwise which indicate the guilt of the Defendant, Terry Wayne Jenkins.

Affidavit of James L. Lalime.

4. That statements given to the Government by witnesses might have been done through coercion or promises on the part of the law enforcement officers involved, or in the alternative, given as a vindictive motive because of the Defendant's dissention of the witnesses in question.

5. That the Defendant Terry Wayne Jenkins, maintains that he is innocent of any crime and that if a crime or crimes were in fact committed, it will be an essential part of the defense to prove * at such crimes were committed by others.

6. To the extent that the Government files reveal the acts of others as having been the actual participants and actors in the various circumstances believed to provide a basis for this prosecution, it is an essential element of this Defendant's defense that he have access to such information and be allowed to prove it at trial.

7. This motion is made in good faith and not for the purposes of delay or to engage in a fishing expedition. The requested items are in possession of the Government and cannot be examined prior to trial other than by order of this Court. The materiality and necessity for the items requested are to be further shown at the hearing on this motion and upon the hearing of other motions set and requested by the Defendant.

8. It is mandatory that all such information be delivered to him sufficiently in advance of trial so he may appraise the same; so that he may know in what regard to exercise his constitutional right to compulsory process to secure the attendance of witnesses; that he may exercise

Affidavit of James L. Lalime.

his constitutional right to the effective assistance of counsel by having his attorney in a position to know what witnesses to summon and what evidence to subpoena, and so that the Defendant may have a fair trial.

WHEREFORE, the Defendant Terry Wayne Jenkins, asks that the Government be ordered to produce all of the information described herein, directly or by implication.

s/ JAMES L. LALIME.

(Sworn to May 24, 1974.)

**Government's Response to Defendant's
Discovery Motion.**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

TERRY WAYNE JENKINS,
Defendant.

CR 74-105.

**GOVERNMENT'S RESPONSE TO PRE-TRIAL
MOTIONS.**

The United States of America by its attorney, John T. Elfvin, United States Attorney in and for the Western District of New York, by James A. Fronk, Assistant United States Attorney, herein responds to certain pre-trial motions made on behalf of the defendant, Terry Wayne Jenkins, as follows:

1. That the defendant requests any and all statements made by Government witnesses concerning the guilt or innocence of the defendant. The Government declines to provide any statements made by its witnesses to the defense at this time. The statements of any and all Government

Government's Response to Defendant's Discovery Motion.

witnesses in this matter will be produced at the time of trial in accordance with Title 18, United States Code, Section 3500.

The Government represents that it has no *Brady* material at the present time, or statements made by witnesses concerning the innocence of the defendant, Terry Wayne Jenkins, but it is ever mindful of its continuing obligation to produce such material and should such material become known, it would immediately forward it to the defendant.

2. That the defendant requests that the Government itemize and indicate with particulars any and all evidence of every kind which has been recovered from the private premises of its witnesses. The Government at this time declines to provide any items which might have been seized from the private premises of any of its witnesses.

3. That the defendant has made a prior oral motion in front of the United States Magistrate, Edmund F. Maxwell, for disclosure of the Grand Jury minutes and the names of any and all witnesses who testified before said Grand Jury in relation to this matter. The Grand Jury proceedings resulting in the Indictment herein were transcribed. The Government declines to provide the minutes of the Grand Jury proceedings to the defense at this time. Citing *United States v. Youngblood*, 379 F.2d 365 (2nd Cir. 1967); *United States v. Birrell*, 276 F.Supp. 798 (S.D. N.Y. 1967).

Government's Response to Defendant's Discovery Motion.

The testimony of any and all witnesses who appeared before the Grand Jury, in this matter, will be produced at the time of trial in accordance with Title 18, United States Code, Section 3500.

Dated at Buffalo, New York, this 30th day of May, 1974.

Respectfully submitted,

JOHN T. ELFVIN,
United States Attorney,
Western District of New York,
502 United States Court House,
Buffalo, New York 14202.

By: JAMES A. FRONK,
Assistant United States Attorney.

To:

James L. Lalime, Esq.,
of Counsel,
Attorney for Defendant,
1710 Liberty Bank Building,
Buffalo, New York 14202.

Transcript of Proceedings, June 18, 1974.

M. L. Diaz, for Government, Direct.

[63] **Transcript of Proceedings.**

Proceedings:

June 18, 1974, 1:38 p. m.

Appearances:

As before noted.

(Defendant present.)

(Jury present.)

The Court: All right. The jury is here and the defendant, Mr. Fronk and Mr. Lalime. Your next witness, please, Mr. Fronk.

Mr. Fronk: The Government calls Mary Diaz.

MARY L. DIAZ (68 Oliver Street, North Tonawanda, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Fronk:

Mr. Fronk: Your Honor, before I begin questioning, the Government Exhibits 8 and 9 for identification, the diagram and stipulation I have moved into evidence.

Mr. Lalime: No objection.

The Court: No objection. They will be marked in evidence at the proper time.

Mr. Fronk: Thank you.

The Court: Why not proceed.

M. L. Diaz, for Government, Direct.

[64] By Mr. Fronk:

Q. Miss Diaz, where do you currently reside? A. 68 Oliver Street, North Tonawanda.

Q. How long have you lived there? A. A year and a half.

The Court: Miss Diaz, up a little further. Sit back and be comfortable and speak up.

By Mr. Fronk:

Q. When did you first take up residence at 68 Oliver? A. In December of '73.

Q. And where did you reside before that? A. In Florida.

Q. And are you married, Miss Diaz? A. No, I am a widow.

Q. Do you have any children? A. Three.

Q. I see, and have you ever made the acquaintance of an individual named Terry Wayne Jenkins? A. Yes, sir.

Q. And where did you first meet this individual? A. In Florida.

Q. And approximately when would that be? A. In August of 1972.

[65] Q. And can you describe the nature of your relationship with the defendant? Are you a friend of his? A. I dated him.

Q. I see, and you indicate that you have known the defendant for how long? A. About two and a half years.

Q. The gentleman described as Terry Wayne Jenkins that you are speaking of, do you see this individual in court today? A. Yes, sir.

Q. Can you point him out? A. Over here.

Q. Would you describe the individual? At this table over here. A. He has a brown shirt on.

M. L. Diaz, for Government, Direct.

Q. Let the record reflect that the witness has identified the defendant. Did there come a time after you left Florida when you saw Jenkins again? A. Yes.

Q. Can you tell us approximately when that was? A. In February of 1973.

Q. And where would that have been? A. Up here in my apartment.

Q. In North Tonawanda? A. Right.

[66] Q. And can you tell us the circumstances that caused you to see defendant again? A. He come to visit me.

Q. I see, and during his visit to North Tonawanda, where did he stay? A. At my apartment.

Q. And where is that apartment located? What is the street address? A. 68 Oliver.

Q. And in what city or town is that in? A. North Tonawanda.

Q. Miss Diaz, I am going to show you Government Exhibit 8 in evidence and ask you if you can identify this?

A. That is the post office, North Tonawanda Post Office across the street from my house.

Q. You indicate that it is where? A. Across the street from my house.

Q. I wonder if you could be kind enough to take a pointer and indicate approximately where your house would be then across the street from the post office? A. Well, a little above this red dot here. About right here.

Q. I see. Thank you. She indicated just above the red dot.

Mr. Lalime: Thank you.

M. L. Diaz, for Government, Direct.

[67] By Mr. Fronk:

Q. And you stated that apartment would be on Oliver Street? A. Yes, sir.

Q. And is it a correct statement that you just pointed to an area across the street from the post office? A. Yes, sir.

Q. Miss Diaz, I am going to show you Government Exhibit for identification, Number 6, and ask you if you can identify this photograph? A. It is a picture of the post office across the street from my house.

Q. And are you indicating that this is a picture of the post office as it could be viewed directly across the street from your house? A. Yes, sir.

Q. Is this picture a fair and accurate representation of the post office from your house? A. Yes, sir.

Mr. Fronk: If it please the Court, I move Government Exhibit Number 6 for identification into evidence.

Mr. Lalime: No objection.

(Government Exhibits Numbered 6, 8, 9, respectively, received in evidence.)

[68] By Mr. Fronk:

Q. Now, drawing your attention to this period in February of 1973, specifically February the 24th, 1973, on a Saturday night, did Jenkins indicate anything to you that night that stands out in your mind? A. Yes. He told me he was going to rob the post office.

Q. Could you tell me specifically what he said to you, as best you recall? A. He said, "I am going to rip off the post office".

M. L. Diaz, for Government, Direct.

Q. And what, if anything, did you say to him? A. I told him not to do it, it was stupid, the FBI or some Government agency would be involved in it.

Q. And what, if anything, did he respond to you? A. That North Tonawanda was rinky dink.

Q. I see, and at what time did the defendant indicate this to you? A. About 9:00 o'clock.

Q. All right. After defendant said this to you, did he have occasion to say anything else to you about this, about his indication, robbing the post office? Strike that. You indicate approximately 9:00 o'clock defendant indicated to you that he was going to rob the post office. Can you remember exactly what defendant did after that? A. He got his clothes on and took a screwdriver and left my apartment and went across the street to the post [69] office.

Q. Can you indicate how he was dressed? A. He had on a jacket and gloves, boots.

Q. And approximately what time would this have been that defendant left your apartment? A. About 10:00 o'clock at night.

Q. And do you indicate that he had something with him? A. A screwdriver.

Q. Could you describe that screwdriver? A. It has a yellow handle and fairly long. I say about twelve inches long.

Q. And where did defendant get that screwdriver? A. From my kitchen drawer.

Q. Miss Diaz, I show you what is marked Government Exhibit Number 5 for identification and ask you if you can identify this? A. Yes. It looks like my screwdriver.

M. L. Diaz, for Government, Direct.

Q. You are indicating that it looks like a yellow handled screwdriver approximately twelve inches long that you have just testified about? A. Yes, sir.

Q. After defendant left your apartment, I wonder if you can tell us at what time he returned?

Mr. Lalime: I am going to object to leading the witness. If she knows the story, [70] let her tell the story, your Honor.

The Court: Please do not lead, Mr. Fronk.

By Mr. Fronk:

Q. What time did defendant leave your apartment?

A. 10:00 o'clock.

Q. And did he return that evening? A. Yes, sir.

Q. Approximately what time? A. About 11:15.

Q. And when he returned, did he have anything with him? A. Yes. He had four brown bags.

Q. Would you describe these brown bags, please? A. They had a draw string across the top and had clips on the end.

Q. Approximately how big, what size would the bags be? A. They were large.

Q. I see, and did he have anything else with him? A. The screwdriver.

Q. The screwdriver you previously identified? A. Yes, sir.

Q. Was there anything about this screwdriver that struck you when you saw it? A. It was bent and it wasn't when he left the house.

Q. I show you Government Exhibit 5 for identification and [71] ask you if you can identify that? A. Yes, sir.

M. L. Diaz, for Government, Direct.

Q. You say "yes, sir". Is there anything about this screwdriver— A. It is bent.

Mr. Fronk: Your Honor, at this time, Government Exhibit 5 for identification, I move it into evidence.

Mr. Lalime: I have no objection.

The Court: No objection. Mark it in evidence, please.

(Government Exhibit Number 5 received in evidence.)

By Mr. Fronk:

Q. Miss Diaz, after defendant returned to your apartment, you indicated approximately 11:15, you indicated he had certain brown bags with him. What, if anything, did he do with these bags? A. He emptied them on the kitchen,—on the living room floor.

Q. And what did you observe when he emptied these bags? A. Stuff from the post office, post cards.

Q. Now, could you tell us exactly what you saw, what you [72] observed when these bags were emptied? A. Post cards, letters, business size, letter size, sheets of stamps, rolls of stamps and some cards that had writing on them, some kind of receipts or something.

Q. Now, after defendant emptied these on the floor, as you previously testified, what did he do? A. He sorted them on the,—put some of them in a suitcase and some went in a duffel bag.

Q. And after defendant sorted these items, did he say anything to you? A. Yes, to never tell anybody.

Q. Could you tell us, as best you remember, whatever defendant said to you after he sorted this material? A.

M. L. Diaz, for Government, Direct.

He told me if I told anybody he would either involve me or he would fix me.

Q. I wonder if you could indicate, Miss Diaz, what, if anything, was done with the mail bags? A. They were put in some garbage bags and garbage put on top and set out to the curb for the garbage men.

Q. Drawing your attention to Monday, the 26th of February, 1973, was the defendant in your apartment that evening? A. No. He went out.

Q. About what time did he leave? A. Early evening.

Q. Can you give me an approximation as to the time when he [73] might have left? A. 6:00, 7:00.

Q. Did the defendant tell you where he was going? A. Yes, sir.

Q. Where did he say he was going? A. Joe and Ann's Bar.

The Court: Can you keep your voice up, please, Miss Diaz.

By Mr. Fronk:

Q. Can you tell us where Joe and Ann's Bar is located? A. On Manhattan Street in North Tonawanda.

Q. When defendant left your apartment, did he have anything with him? A. He took some rolls of stamps out of the suitcase with him.

Q. You are indicating a suitcase. Can you tell us what suitcase you are speaking of? A. My suitcase.

Q. And he took,—what exactly, Miss Diaz, did he take out of that suitcase? A. Rolls of stamps.

Mr. Lalime: I didn't hear that response.

The Court: Rolls of stamps.

M. L. Diaz, for Government, Direct.

Mr. Lalime: Before that, your Honor. Did she [74] say it was her suitcase? I didn't hear that.

The Witness: Yes, sir.

By Mr. Fronk:

Q. Miss Diaz, drawing your attention back to Saturday night, the 24th of February, you indicated, I believe, on direct answer to my testimony that the contents of the brown bags were sorted and put into a suitcase and a duffel bag? A. Yes, sir.

Q. Was that your suitcase they were put into? A. Yes, sir.

Q. And where was this suitcase then put? A. In a closet in the bedroom.

Q. I see. Getting back to Monday evening, the defendant testified he told you he was leaving the house? A. Yes, sir.

Q. Did he indicate where he was going once again? A. Joe and Ann's Bar.

Q. And again, did he have anything with him? A. He took rolls of stamps with him.

Q. And can you tell us how you remember that? A. I seen him go in the bedroom and put them in his pants pocket.

[75] Q. Did there come a time that same evening when Jenkins contacted you again? A. Yes, sir. He called me on the phone.

Q. And what, if anything, did he say to you? A. He told me to come pick him up, he was drunk and he wanted to come home.

Q. Okay, and what did you do? A. I went down and walked home with him.

M. L. Diaz, for Government, Direct.

Q. Now, do you know who the proprietors of Joe and Ann's Tavern are? A. Yes, sir.

Q. Can you tell us who they are? A. Pete and Ann Cobo.

Q. Have you ever met these two individuals? A. Yes, sir.

Q. Now, during February of 1973, did you ever go to the Joe and Ann's Tavern with the defendant? A. Yes, sir.

Q. Can you ever remember any time you observed the defendant talking to either of the two proprietors or both of them? A. Yes, sir.

Q. When you picked up the defendant on the 26th, as you previously testified to, where did you go, if anywhere? A. Home.

Q. Did there come a time in February of 1973 when the [76] defendant left Buffalo? A. Yes, sir.

Q. Can you tell us, as best you recall, exactly when the defendant left, when that would have been? A. No. It was the first part of March.

Q. March, rather. A. '73.

Q. And can you tell us how he left? A. By Greyhound bus.

Q. And how do you know this? A. Because my cousin and I took him to the bus station.

Q. Did he have anything with him when he left on the bus? A. Yes, two suitcases.

Q. Do you know where defendant was going? A. Indianapolis.

Q. And can you tell us how you know that? A. I bought his ticket.

M. L. Diaz, for Government, Cross.

Q. Have you ever seen the defendant since that date prior to in court today? A. No.

Q. Miss Diaz, did you ever go to the postal authorities and report this or the police? A. No, sir.

Q. Can you tell us why not? A. Because I was scared.

[77] Q. And you never voluntarily went to the postal authorities and reported this? A. No.

Q. Did there come a time when investigative officers approached you? A. Yes, sir.

Q. Can you tell us when that was? A. This March.

The Court: March?

The Witness: Yes, sir.

The Court: Of what year?

The Witness: '74.

By Mr. Fronk:

Q. Now, Miss Diaz, after the postal inspectors approached you in March of this year, did you give them various statements and cooperate with them? A. Yes, sir.

The Court: I think we have enough of that, Mr. Fronk, without going into the statements.

Mr. Fronk: Just one second, your Honor. If the Court please, at this time I have no further questions.

The Court: Mr. Lalime.

[78] CROSS EXAMINATION by Mr. Lalime:

Q. It is Mrs. Diaz, is that right? A. Yes, sir.

Q. What is the date of your marriage, Mrs. Diaz, and where were you married? A. I have been married twice. Which one are you referring to?

Q. I am looking for,—well, both of them. A. I was married in 1964 to Louis Pacheco.

M. L. Diaz, for Government, Cross.

Q. How do you spell that, please? A. P-a-c-h-e-c-o.

Q. e-c-o? A. Yes.

Q. And where were you married? A. In Folkston, Georgia.

Q. Do you know the spelling of that? A. F-o-l-k-s-t-o-n.

Q. Do you recall who that was by? A. It was by a clerk or something. I don't know. We did it in city hall.

The Court: Mr. Lalime, does it matter?

Mr. Lalime: Yes, I think it does, your Honor, in these particular instances. I didn't have the opportunity to interview this witness beforehand and I have to do a [79] little bit of—

The Court: It does not matter whether the marriage ceremony was performed by a clergyman or a clerk, does it?

Mr. Lalime: It might not have been performed, your Honor.

The Court: It does not make any difference. That is not impeaching material.

Mr. Lalime: It isn't. I think it absolutely is.

The Court: If you want to step over here and tell me what the purpose of this questioning is, I will listen to it, but it seems that this has absolutely nothing to do with the testimony. Do you want to explain. Explain it over here.

(Sidebar conference held between Court and counsel as follows):

Mr. Lalime: The first statement she said was she was a widow. Now this widow seems to be married.

Mr. Fronk: She was married twice, your Honor.

M. L. Diaz, for Government, Cross.

The Court: If it is your point that you are going to impeach her by showing that [80] she was not married—

Mr. Lalime: Right.

The Court: It seems that that is not impeaching material. If she was living out of wedlock with somebody, as far as I am concerned, that would only be asked to embarrass her. It has nothing to do with whether she is telling the truth or not.

Mr. Lalime: I have to develop my case further. This individual, we have information she was receiving welfare checks by fraud down in Florida.

The Court: You are in Federal court. You can ask her if she has been convicted of a crime. If you have any material there that would indicate there would be any information because of some connection she had with Jenkins, that it would be impeaching material, I will permit that. Just a minute, but I am not going to permit you to go into other possible fraud cases about whether or not she was getting welfare checks or not from other agencies. Under the rules, that is completely improper cross examination. [81] They may permit that in State court, but I will not permit it here.

Mr. Lalime: If I can go one step further so it is on the record. This witness comes in here to testify against my client, and I have to determine what her motives are. One of the basic motives was when they were in Florida, the argument they had down there, she was receiving welfare checks down there through fraud and against the law and she says "It is none of your goddamn business".

M. L. Diaz, for Government, Cross.

The Court: If you can show motive to have bias against this man, I would permit it, but it does not make any difference if this woman was married before a clerk or a clergyman or what. If you wanted this information and you thought it was important, we could have had it beforehand.

Mr. Lalime: I couldn't. I asked for the witness and—

The Court: Let us get to the information you want and let us not ask questions to embarrass her.

[82] Mr. Fronk: I should point out there are threats on her life I have not brought out prior to what Mr. Lalime has got into, but I haven't brought it into my direct, why she came to North Tonawanda to begin with.

Mr. Lalime: If I don't go into it on cross examination, he can't bring it out on direct.

The Court: That's right.

(Sidebar conference concluded.)

The Court: Continue, Mr. Lalime.

By Mr. Lalime:

Q. The date of that first marriage was in 1964, is that right? A. Yes, sir.

Q. And is that the husband that you are widowed from? A. No, sir.

Q. And that marriage ended in divorce, did it? A. Yes, sir.

Q. What was the date of the divorce? A. 1966.

Q. Any children? A. One child.

[83] Q. And what is the name of that child? A. Louis Pacheco.

M. L. Diaz, for Government, Cross.

Q. How old is Louis now? A. Nine.

Q. And then there came a subsequent marriage? A. Yes, sir.

Q. And what was the date of that? A. That was common law in Florida and it was 1967.

Q. And this husband is now deceased, is that right? A. Yes, sir.

Q. And there were two children by him? A. Yes, sir.

Q. And their ages are what now? A. Five and three.

Q. And they live with you now? A. Yes, sir.

Q. You met Mr. Jenkins down in Florida, is that right? A. Yes, sir.

Q. But actually, your home has always been in Buffalo, is that right? A. No, sir. I haven't been here since I was thirteen.

Q. Since you were thirteen? A. Yes, sir.

Q. And you moved down to Florida, is that right? A. Yes, sir.

[84] Q. And when was that? A. I don't remember the year, but it was when I was thirteen.

Q. And when was the first time that you met Terry Wayne Jenkins? A. In August of '72.

Q. August of '72, and where was that? A. The place or the city?

Q. The place and the city. A. It was at the Stage Door Bar in Hollywood, Florida.

Q. And that is when you started dating, is that right? A. Yes, sir.

Q. And about how long did you date? A. Until I left Florida.

The Court: Until you left Florida?

M. L. Diaz, for Government, Cross.

The Witness: Yes, sir.

The Court: All right.

By Mr. Lalime:

Q. And did he stay with you or did he stay in his own apartment? A. No. He lived with his mom and dad.

Q. Did there come a time sometime during this period that your children were taken away from you? A. No, sir.

Q. Are you receiving public assistance for the two children [85] now or the three children? A. Yes, sir.

Q. Are you receiving it under the name of Pacheco? A. No, sir.

Q. You are receiving it under the name of Diaz? A. Yes, sir.

Q. Now, in the State of Florida, weren't you receiving two checks? A. No, sir.

Q. One for Pacheco? A. No.

Q. And one for Diaz? A. No, sir.

Q. You are absolutely sure of this, is that right? A. Yes.

Q. You told this Court that you left Florida to get away from Terry Wayne Jenkins, is that right? A. Yes, sir.

Q. And how long had you been gone from Florida when Terry Wayne come up to your house? A. Two months.

Q. Then he came right to 68 Oliver Street, is that right? A. Yes.

Q. How did he get that number? A. He called me previously and I gave it to him.

[86] Q. So you weren't really trying to get away from him, were you? A. Yes, I was.

Q. But you did give him your number and your address, is that right? A. Yes, sir.

M. L. Diaz, for Government, Cross.

Q. You told this Court you were afraid of Terry Wayne, is that right? A. Yes, sir.

Q. Now, you still want this Court to believe and this jury to believe that on February 24th, about 10:00 p.m., Terry Wayne Jenkins left your house, took the screwdriver from your drawer which has been identified by you as your screwdriver? A. Yes, sir.

Q. And went over to the post office and come back an hour and fifteen minutes later with five bags, is that right?

A. Yes, sir. I don't know how many bags there were. There were a few.

Q. And what color were these bags? A. Brown.

Q. And did you go over to help him with this burglary? A. No, sir.

Q. How big were these bags, Mrs. Diaz? A. Large, about the size of garbage bags.

[87] Q. Fifty pounds, one hundred pounds, twenty-five pounds? A. I don't know what a twenty-five pound bag is.

Q. Did you pick up a bag? A. No.

Q. You didn't pick up any of the bags? A. No, sir.

Q. And how did he come up the stairs? He had five bags all thrown over his shoulder, is that right? A. I don't know how many there were. There were a couple dragging and a couple over his back.

Q. When he left to rip off, as you put it, the post office, which was across the street, did you call the Tonawanda Police Department? A. No, sir.

Q. You were still frightened because he told you not to tell anybody, is that right? A. Yes, sir.

Q. And he left this area right here where this red dot is, is that where your house is? A. Approximately.

M. L. Diaz, for Government, Cross.

The Court: Keep your voice up, please, Miss Diaz.

By Mr. Lalime:

Q. Did you watch him going out the window? [88]

A. Yes.

Q. And where did he go? A. Across the street and down the alley.

Q. Will you come up here and point to the jury so we understand just the way Terry Wayne Jenkins ripped off this post office? A. Down this way, across the street.

The Court: Keep your voice up, please.

The Witness: And around to the back.

By Mr. Lalime:

Q. He came around across this field. That is one hundred thirty-one feet ten inches? A. Yes.

Q. And sixteen feet, one inch, forty-four feet six inches, and he came around to the back here, is that right, and could you still see him? A. Not in back, no.

Q. But you knew he came that way? A. I seen him go to the corner, but I couldn't see around the corner.

Q. Was it snowing out? A. There was a little snow on the ground and it was cold.

Q. Will you take your seat again. How long had Terry been in the Buffalo area or the North Tonawanda area when this [89] happened? A. If I remember right, he came February the 11th.

Q. And this was February the 24th, twelve days, approximately thirteen days? A. Right.

Q. And when you told him that the FBI and the Federal authorities would be involved, he told you that the North

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Tonawanda Police Department were rinky dink? A. Yes, because it was a little city compared to Hollywood.

Q. And that was the observation he made in that twelve day period? A. Yes, sir.

Q. Terry Wayne comes back to your house with five heavy bags of postal material, is that right? About 11:15? A. Yes, sir.

Q. Were you drinking? A. I don't know how heavy it was. I didn't carry them. They were big bags.

Q. Were you drinking at that time? A. No, sir.

Q. Do you take drugs of any kind? A. No, sir.

Q. Do you sniff glue? A. No, sir.

Q. And he dumped all this stuff out on the floor of the [90] living room? A. Yes.

Q. And he put it in your suitcases, is that right? A. Parts of it. Some of it went in a duffel bag.

Q. Some went into a duffel bag? A. Yes.

Q. And these weren't your duffel bags? A. No, sir, it wasn't. He brought it with him when he was coming.

Q. The piece of equipment that he went across the street was this that he took out of your drawer, is that right? A. Right.

Q. You identified that as the screwdriver from your house? A. Yes.

Q. That is People's Exhibit Number 5 in evidence, and you recognize it because it is bent, is that right? A. And the yellow handle.

Q. The yellow handle. A. It has been in my possession since that time.

Q. Is has been in your possession since that time? A. Yes, sir.

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Q. Did they give it back to you? A. Terry gave it to me until I gave it to the postal inspector.

Q. Didn't you tell the Court on direct examination it was in the glove compartment of your car when you gave it to [91] the postal authorities? A. No, I didn't say it was in the glove compartment. I said it but not right just now.

Q. In prior statements you said that? A. Yes.

Q. That it was in the glove compartment? A. Yes, sir.

Q. So what Terry did was rip off the post office, come across the street, drag the bags upstairs, went down and put the screwdriver in your glove compartment? A. No. He brought it upstairs because I didn't have a car at that time.

Q. You didn't have a car at that time? A. No, sir.

Q. When did you get this car? A. In July of 1973. My mother gave it to me for a birthday present.

Q. After Terry had left the area then? A. Yes, sir.

Q. July of '73? A. Yes, sir.

Q. I am kind of confused now because Terry left in February or March of 1973? A. Yes.

Q. And you told the post office authorities that this [92] screwdriver,—that you alleged Terry used in the burglary, was in the glove compartment of your car. A. I didn't say it was there all the time. I say I found it in the glove compartment of my car. It has been in my possession since then.

Q. Do you have any other boyfriends? A. No, sir.

Q. You are not dating any other boys at that time? A. Now, yes.

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Q. How about then? A. No.

Q. Did he have access to your car? A. Now?

Q. Yes. A. I imagine so. He has his own car. He doesn't drive mine.

Q. He doesn't drive your car? A. No.

Q. Does he ever ride in your car? A. Very rarely, but he does on occasion, yes.

Q. But he does, doesn't he? A. On occasion he does, yes.

Q. Did Terry ever, going back to the Florida arrangement for just a little while, when you were down there with Terry, did he ever tell you it is against the law to [93] receive two checks under two different names for the Welfare? A. No, because I wasn't getting two checks.

Q. He never told you that though? A. No.

Q. Now, there came to pass a time when the post office authorities came to your house, is that right? A. Yes, sir.

Q. And they asked you certain questions if you had seen somebody going across the field and burglarize this post office, is that right? A. Yes.

Q. Did you volunteer that information before March 11th? A. No, sir.

Q. Because you were frightened of Terry Wayne Jenkins? A. Yes, sir.

Q. Who was no longer in the area, right? A. Yes, sir.

Q. Mrs. Diaz, on the night of February 24th and the morning of February 25th, do you recall where you were on that night? A. Yes. I was home.

Q. Are you sure you were not at Ann & Joe's Bar from about 10:00 o'clock until closing? A. No, sir.

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[94] Q. You are sure of that now? A. You are talking about the same night of the burglary?

Q. The night of the burglary, right. A. No, sir.

Q. You didn't have an argument with Terry Wayne at that bar that night, did you? A. No, sir.

Q. In front of Pete and Ann? A. No, sir.

Q. When was the next time you were at Ann & Joe's or Joe & Ann's Bar with Terry? A. The Monday after the robbery.

Q. The Monday after the robbery. Did the both of you go together? A. No, sir.

Q. You went over to pick him up as you said? A. Yes, sir.

Q. And he was drunk? A. Yes, he was drunk.

Q. And you didn't call the police at this time that a robbery had taken place, did you? A. No.

Q. You told me that there was no other guy involved at this time, is that right? A. Not before Terry left, no, sir, and not right directly [95] after.

Q. Did you know if there was another girl involved with Terry? A. I don't know.

Q. Did he tell you he was leaving and not coming back? A. He said he was leaving. He didn't say if he was coming back or anything. He was going.

Q. Were you kind of disappointed in him leaving? A. No, sir.

Q. But if you moved again you would give him your address and telephone number like you did in Florida, is that right? A. No.

Q. Do you have a new automobile? A. No, I do not have a new automobile.

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Q. What is the year of your automobile? A. '68 Falcon.

Q. '68 Falcon. Do you know where that was purchased?

A. It was purchased in the Catskills and it was purchased from the Electric & Gas Company by my mother as a birthday present.

Q. And you didn't purchase this? A. No, sir.

Q. With what? A. I didn't purchase the car.

Q. Did Terry leave any stamps or post cards with you?

[96] A. No, sir.

Q. He took everything? A. He took everything.

Q. And the only thing you turned over to the post office authorities was this screwdriver? A. Yes, sir.

Q. Do you know that Terry Wayne Jenkins got married recently? A. Yes, sir.

Q. Were you disappointed in this? A. No.

Q. Were you happy because of it? A. I don't care one way or the other, you know, if he wants to get married.

Q. And you didn't feel yourself scorned in this particular situation? A. No, sir.

Q. You say there was snow on the ground, is that right, and you watched him as he walked all the way around? I want to make this clear, he walked from this house across Oliver Street, over to here? A. I didn't watch him walk to where you are.

Q. To here? A. Yes, sir.

Q. Did you hear a broken window or anything? A. No, sir.

[97] Q. You weren't listening? A. Well, I could hear that far but I couldn't see that far.

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Q. You couldn't have been standing right here, could you, by any chance? A. No, sir.

Q. And this could have been somebody else over here? A. No, sir.

Mr. Lalime: I have no further questions.

The Court: Mr. Fronk.

Mr. Fronk: I have no further questions, your Honor.

The Court: All right, Mrs. Diaz, thank you. That is all. Next witness, please.

Mr. Fronk: I would like to call Candy Brainard.

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